



**Rep. Albers Testimony on AB 368 before the
Assembly Committee on Judiciary Ethics
June 7, 2007**

Thank you Chairman Gundrum and members of the committee for allowing me to testify before you today on Assembly Bill 368. This is a fairly simple and straightforward bill that seeks to correct an anomaly in state statutes as a result of two Court of Appeals decisions on judicial review of agency decisions. The situation is as follows:

Until about seven years ago, it was assumed that the statutory 30 day period for judicial review of state agency decisions applied to review of both contested and non-contested cases. A contested case is defined as "an agency proceeding in which the assertion by one party of any substantial interest is denied or controverted by another party in which, after a hearing required by law, a substantial interest of a party is determined or adversely determined by a decision or order." A non-contested case is a case in which there is no disagreement among the parties or a case in which a hearing is not required by law.

However, two related decisions by the Court of Appeals (*Hedrich v. UW Board of Regents* and *Collins v. Policano*) determined that the 30 day period for judicial review applied only to contested cases. It determined that no statutory period applied to non-contested cases, so a 6 month "default" period applied.

This extended period for non-contested cases makes no practical sense. AB 368 would correct this illogical discrepancy as created by the Court of Appeals and end any confusion for petitioners for review of judicial decisions and practitioners of the law.

Thank you for your consideration, and I would be happy to answer any questions you might have.

CHAPTER 227

ADMINISTRATIVE PROCEDURE AND REVIEW

SUBCHAPTER I GENERAL PROVISIONS

- 227.01 Definitions.
- 227.02 Compliance with other statutes.
- 227.03 Application of this chapter.

SUBCHAPTER II ADMINISTRATIVE RULES

- 227.10 Statements of policy and interpretations of law; discrimination prohibited.
- 227.11 Extent to which chapter confers rule-making authority.
- 227.113 Incorporation of local, comprehensive planning goals.
- 227.114 Rule making; considerations for small business.
- 227.115 Review of rules affecting housing.
- 227.116 Rules to include time period.
- 227.117 Review of rules impacting energy availability.
- 227.12 Petition for rules.
- 227.13 Advisory committees and informal consultations.
- 227.135 Statements of scope of proposed rules.
- 227.137 Economic impact reports of proposed rules.
- 227.138 Department of administration review of proposed rules.
- 227.14 Preparation of proposed rules.
- 227.15 Legislative council staff.
- 227.16 When hearings required.
- 227.17 Notice of hearing.
- 227.18 Conduct of hearings.
- 227.19 Legislative review prior to promulgation.
- 227.20 Filing of rules.
- 227.21 Publication of rules; incorporation by reference.
- 227.22 Effective date of rules.
- 227.23 Forms.
- 227.24 Emergency rules; exemptions.
- 227.25 Revisor.

- 227.26 Legislative review after promulgation; joint committee for review of administrative rules.
- 227.27 Construction of administrative rules.
- 227.30 Review of administrative rules or guidelines.

SUBCHAPTER III

ADMINISTRATIVE ACTIONS AND JUDICIAL REVIEW

- 227.40 Declaratory judgment proceedings.
- 227.41 Declaratory rulings.
- 227.42 Right to hearing.
- 227.43 Division of hearings and appeals.
- 227.44 Contested cases; notice; parties; hearing; records.
- 227.45 Evidence and official notice.
- 227.46 Hearing examiners; examination of evidence by agency.
- 227.47 Decisions.
- 227.48 Service of decision.
- 227.483 Costs upon frivolous claims.
- 227.485 Costs to certain prevailing parties.
- 227.49 Petitions for rehearing in contested cases.
- 227.50 Ex parte communications in contested cases.
- 227.51 Licenses.
- 227.52 Judicial review; decisions reviewable.
- 227.53 Parties and proceedings for review.
- 227.54 Stay of proceedings.
- 227.55 Record on review.
- 227.56 Additional evidence; trial; motion to dismiss; amending petition.
- 227.57 Scope of review.
- 227.58 Appeals.
- 227.59 Certification of certain cases from the circuit court of Dane County to other circuits.
- 227.60 Jurisdiction of state courts to determine validity of laws when attacked in federal court and to stay enforcement.

SUBCHAPTER I

GENERAL PROVISIONS

227.01 Definitions. In this chapter:

(1) "Agency" means a board, commission, committee, department or officer in the state government, except the governor, a district attorney or a military or judicial officer.

(2) "Code", when used without further modification, means the Wisconsin administrative code under s. 35.93.

(3) "Contested case" means an agency proceeding in which the assertion by one party of any substantial interest is denied or controverted by another party and in which, after a hearing required by law, a substantial interest of a party is determined or adversely affected by a decision or order. There are 3 classes of contested cases as follows:

(a) A "class 1 proceeding" is a proceeding in which an agency acts under standards conferring substantial discretionary authority upon it. "Class 1 proceedings" include rate making, price setting, the granting of a certificate of convenience and necessity, the making, review or equalization of tax assessments and the granting or denial of a license.

(b) A "class 2 proceeding" is a proceeding in which an agency determines whether to impose a sanction or penalty against a party. "Class 2 proceedings" include the suspension or revocation of or refusal to renew a license because of an alleged violation of law. Any proceeding which could be construed to be both a class 1 and a class 2 proceeding shall be treated as a class 2 proceeding.

(c) A "class 3 proceeding" is any contested case not included in class 1 or class 2.

(4) "Hearing examiner" means a person designated under s. 227.43 or 227.46 (1) to preside over a contested case.

(5) "License" includes all or any part of an agency permit, certificate, approval, registration, charter or similar form of permission required by law, except a motor vehicle operator's license

issued under ch. 343, a vehicle registration certificate issued under ch. 341, a license required primarily for revenue purposes, a hunting or fishing approval or a similar license where issuance is merely a ministerial act.

(6) "Licensing" means an agency process relating to the granting, denial, renewal, revocation, suspension, annulment, withdrawal or amendment of a license.

(7) "Official of the agency" means a secretary, commissioner or member of a board of an agency.

(8) "Party" means a person or agency named or admitted as a party in a contested case.

(9) "Person aggrieved" means a person or agency whose substantial interests are adversely affected by a determination of an agency.

(10) "Proposed rule" means all or any part of an agency's proposal to promulgate a rule.

(11) "Register" means the Wisconsin administrative register under s. 35.93.

(12) "Revisor" means the revisor of statutes.

(13) "Rule" means a regulation, standard, statement of policy or general order of general application which has the effect of law and which is issued by an agency to implement, interpret or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency. "Rule" does not include, and s. 227.10 does not apply to, any action or inaction of an agency, whether it would otherwise meet the definition under this subsection, which:

(a) Concerns the internal management of an agency and does not affect private rights or interests.

(b) Is a decision or order in a contested case.

(c) Is an order directed to a specifically named person or to a group of specifically named persons that does not constitute a general class, and which is served on the person or persons to whom it is directed by the appropriate means applicable to the order. The

PROPOSAL TO AMEND WIS. STAT. § 227.53(1)(a)2 TO PROVIDE A UNIFORM 30 DAY PERIOD FOR JUDICIAL REVIEW OF AGENCY DECISIONS IN BOTH CONTESTED AND NONCONTESTED CASES.

The time period for a party to seek judicial review of a decision by a state agency is set forth in Wis. Stat. § 227.53(1)(a)2, which provides:

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review of the decision as provided in this chapter and subject to all of the following requirements:

...
[a]2. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency.

Until about 7 years ago, it was assumed that this statutory 30-day period for judicial review of state agency decisions applied to review of both contested and noncontested cases. A contested case is “an agency proceeding in which the assertion by one party of any substantial interest is denied or controverted by another party and in which, after a hearing required by law, a substantial interest of a party is determined or adversely determined by a decision or order.” Wis. Stat. § 227.01(3). A noncontested case is a case in which there is no disagreement among the parties or a case in which a hearing is not required by law.

Then came two related cases¹ by the Court of Appeals in which the court determined that the 30 day period for judicial review set forth in § 227.53(1)(a)2 applied only to contested cases. It determined that no statutory period applied to noncontested cases, and it therefore applied a 6 month “default” period. *Hedrich v. Board of Regents of Univ. of Wisconsin*, 2001 WI App. 2008, 248 Wis.2d 204, 216, 635 N.W.2d 650. While this 6 month default period may have been required by the Court’s determination that Wis. Stat. Ch. 227 fails to provide a limitation period for review of noncontested cases, it does not make practical sense for several reasons. 1. The 30 day period of § 227.53(1)(a)2 is designed to provide finality for agency decisions. A six month period frustrates that purpose. 2. There are situations when it is unclear whether a case is contested or

¹ *Collins v. Policano*, 231 Wis.2d 420, 605 N.W.2d 260 (Ct. App. 1999); *Hedrich v. Board of Regents of Univ. of Wisconsin*, 2001 WI App. 2008, 248 Wis.2d 204, 635 N.W.2d 650.

noncontested, leading to confusion as to the appropriate period for judicial review. 3. Since § 227.53(1)(a)2 still contains the 30 day period, casual practitioners of administrative law may be unaware of the different period for noncontested cases set by the Court of Appeals in *Hedrich*. 4. No logical reason exists to justify a different period of review for noncontested cases than the 30 day period set forth for contested cases.

To resolve the situation and avoid confusion, I would like to propose amending Wis. Stat. § 227.53(1)(a)2 to “return” to the pre-*Hedrich* 30 day review periods for both contested and noncontested cases by adding the following sentence to that subparagraph: “A petition for judicial review of a decision in a noncontested case shall be served and filed within 30 days after service of the decision upon all parties.”